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Supreme Court of the United States.

OCTOBER TERM, 1903.

CHARLES T. BARNEY,
Appellant,

vs.

THE CITY OF NEW YORK, THE BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS FOR THE CITY OF NEW YORK *et al.*,
Appellees.

No. 159.

BRIEF FOR THE APPELLEES, THE RAPID TRANSIT BOARD AND ITS MEMBERS.

EDWARD M. SHEPARD,
Of Counsel for Rapid Transit Board and its Members,
New York City, N. Y.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1903,—No. 159.

CHARLES T. BARNEY,
Appellant,

versus

THE CITY OF NEW YORK, THE BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS FOR THE CITY OF NEW YORK *et al.*,
Appellees.

Brief for Appellees, the Rapid Transit Board and Commissioners forming it.

Appeal from a decree of the Circuit Court of the United States for the Southern District of New York, dismissing the complainant's bill for want of jurisdiction.

All of the parties are citizens of the State of New York.

The Appellee, the City of New York, is building a rapid transit railroad under some of its streets. The Rapid Transit Board, another Appellee, having, in behalf of the City, devised the Routes and General Plan for the work,—made a

contract for its performance with the Appellee, McDonald, and is now in supervising control of the work,—all under the authority of the Rapid Transit act of the State, chapter 4 of its laws of 1891 as amended.* Park Avenue is one of the north and south streets under which the railroad was authorized and is being built. Such Routes and General Plan were prescribed by the Rapid Transit Board by resolutions adopted on 14th January and 4th February, 1897, in pursuance of such rapid transit act (Bill of Complaint, *p.* 7).

The Appellant, the complainant below, is the owner of the premises at the northeast corner of Park Avenue and 38th Street and is, therefore, an abutting owner on the easterly side of the rapid transit route. The Routes and General Plan, having been thus prescribed by the Rapid Transit Board, received in pursuance of the rapid transit act the assent of the local authorities and of the Appellate Division of the Supreme Court in lieu of the consent which a majority in value of the property owners had refused. The Appellant himself, according to the allegation of his bill (*p.* 7),

> "*consented* to the construction of the said "rapid transit railroad in accordance with the "said Route and General Plan of construction "and did not oppose the proceedings herein- "after mentioned which the said Board of "Rapid Transit Railroad Commissioners in- "stituted for the purpose of obtaining the de- "termination of three commissioners appoint-

*Amended by chaps. 102 and 556 of the laws of 1892, chaps. 528 and 752 of the laws of 1894, chap. 519 of the laws of 1895, chap. 729 of the laws of 1900, chap. 587 of the laws of 1901 and chaps. 533, 542, 544 and 584 of the laws of 1902.

"ed by the said Appellate Division that such "rapid transit railroad ought to be construct- "ed and operated; nor did your orator oppose "the confirmation of said determination by the "said Appellate Division."

The Appellant alleged, however, that the portion of the railroad under Park Avenue and in front of his premises, and which is called the "*easterly tun- "nel section*," was being built 27 feet nearer to his premises than was authorized by the Routes and General Plan; and that the work (Bill, *p.*10) was—

"being thus performed by said defendant, "McDonald, and the said Shaler (the contract- "ors) *without any authority* other than certain "directions given by the chief engineer em- "ployed by the Board of Rapid Transit Com- "missioners and embodied in certain so-called "working drawings or detail drawings pre- "pared by him or at his instance and recently "approved informally by said Board.

"And * * * that the fact that such "directions had been given by the chief "engineer and that said work was being "thus performed by the contractor, as "aforesaid, was not until recently specifically "known to said Board; that such action of said "chief engineer and contractor has never "been formally or specifically approved by "said Board; that there has been no change "made or authorized by said Board in the said " 'Routes and General Plan,' nor has there "been any modification of the contract or spec- "ifications with reference to the construction "of that part of the tunnel lying under Park "Avenue between 33rd and 41st Streets; that "no notice was given to any of the property

"owners along said street that it was proposed "by the defendants or any of them to change "the position of the tunnel to any material ex- "tent from the position shown and described "in the said 'Routes and General Plan,' nor "was any opportunity ever given to said prop- "erty owners or the citizens generally to be "heard with respect to any such change."

The complainant claimed, therefore (Bill, *p.* 11),

"*that at none of the times herein mentioned* "*did the said Board * * * have authority* "(if at all) to enter into any contract for the "construction of any rapid transit railroad "under or upon the said Park Avenue *except* "*in accordance with the said 'Routes and Gen-* "*'eral Plan,' * * ** and *that at no time did* "*the said Board have authority* to prepare de- "tailed plans or specifications, *except* (if at "all) *in accordance with the said general plan* "*of construction, or to alter any plans* or spec- "ifications prepared by them *excepting in ac-* "*cordance with said general plan of construc-* "*tion.* That the act of the said Board in "permitting the defendants McDonald and the "said Shaler to enter upon *that part* of Park "Avenue * * * *where the tunnel is now in* "*process of construction as aforesaid was ille-* "*gal and unauthorized* * * * and * * * "that the construction of the rapid transit "railway on the easterly side of Park Avenue "in front of your Orator's said premises, takes "his property without due process of law."

The complainant prayed an injunction against the construction of the easterly tunnel section in front of his premises. (Bill, *p.* 12).

Upon his bill and upon affidavits the complain-

ant-appellant moved for an injunction *pendente lite*. This motion was resisted by the defendants who, pursuant to a stipulation (*pp.* 72-73) submitted in opposition their affidavits in the case brought by Arabella D. Huntington against the same defendants (*pp.* 49-72). The Huntington case is now before this Court upon a like question of jurisdiction, as No. 173 of this Term.

The defendants-appellees sought upon the motion (their affidavits, *pp.* 51-54, 60-62), to show that the construction *was* within the description of the Routes and General Plan and *was* therefore duly authorized by the Rapid Transit legislation. The court below was of opinion that the defendant's construction was not within the Routes and General Plan or authorized by the legislation under which the defendants acted (Opinion at *p.* 41, adopting the opinion in the Huntington case, *pp.* 67-72); and for that very reason held that the act of the defendants, as being thus unlawful and unauthorized, was not an act of the State of New York and that, therefore, the court had no jurisdiction.

On its own motion under sect. 5 of the Act of March 3, 1875 (Chap. 137), the court below thereupon entered a decree dismissing the bill of complaint "for the reason that such suit does "not really substantially involve a dispute or con- "troversy properly within the jurisdiction of this "court" (*p.* 75); and it has certified to this Court the following question (*p.* 42):

> "Is this court (the Circuit Court) with- "out jurisdiction of this cause for the reason

> "that the acts of the defendants in building "and constructing the easterly portion of the "tunnel in Park Avenue in the City of New "York were not acts of the State of New York "to which the prohibition of the Fourteenth "amendment of the Constitution of the United "States which provides that no State shall " 'deprive any person of life, liberty or prop- " 'erty without due process of law' has ap- "plication?"

The matters to be argued here are, of necessity, the two following:

1. Was the construction of the easterly tunnel section under Park Avenue, at the place where it was constructed, an act of the State of New York?

2. Did such construction deprive the complainant of property without due process of law?

Preliminary Statement of Law.

The nature of the defense is immaterial. The Appellees do not, therefore, argue here, as they would if the merits were before this Court, that the learned judge below was wrong in thinking, as he apparently did, that, if the defendants established the absence of merit in the complainant's cause, their success would anomalously establish the jurisdiction of the court against them. The complainant must by the allegations of his own bill, present a case within the jurisdiction of the court below (*Defiance Water Co.* v. *Defiance*, 191 U. S., 184).

If the allegations of the complainant's bill be assumed,—and here and now they must be assumed,—to be true, then the construction of the easterly tunnel section was not an act of the State of New York.

For, in this matter, the City of New York acts solely by the Rapid Transit Board. And the State has given the Board no general authority over streets or over rapid transit or any general authority whatsoever. The language quoted by the Appellant from section 1 of the Rapid Transit Act, conferring upon the Board "such other and necessary "powers as may be requisite to the efficient per- "formance of *the duties imposed upon said Board*" by the act obviously does not enlarge the scope of the duties. Those duties must be distinctly marked out before there can be any question as to what is incidental to them. The Appellant's argument below was,—and the whole tenor of his bill now is,—that the construction of the easterly tunnel section was entirely beyond the power vested by the laws of New York in the Rapid Transit Board or the Contractors. It was not contended by either party,—nor do the provisions of the rapid transit act permit the contention,—that the Board, as an incident to the construction of a tunnel or tunnel section which *was* authorized, could construct an entirely distinct and different tunnel or tunnel section which was *not* authorized.

If, as the complainant alleged, the easterly tunnel section as constructed in front of his premises were not within the Routes and General Plan which had been prescribed by the Rapid Transit Board

and approved by the local authorities and the Supreme Court,—but was something entirely distinct and in a different place,—then clearly the construction was not authorized by the State or by any representative of the State. The Board was a sheer creature of statute. It had no constitutional power and no power of any kind except what was strictly and jealously prescribed for it. Section 4 of the Rapid Transit Act* gave it the power to prescribe the routes and general plan of any proposed rapid transit railroad within this City. Every such general plan was required by that section

> "to contain such details as to manner of con-
> "struction as may be necessary to show the
> "extent to which any street, avenue or other
> "public place is to be encroached upon and the
> "property abutting thereon affected."

The same section required that the consent of the "local authorities having control of "that portion of a street or highway upon which "it is proposed to construct or operate such rail-"way or railways be first obtained;" and further required a corresponding consent of the owners of a majority in value of the abutting property, or if their consent could not be obtained, then in lieu thereof, the consent of the Appellate Division of the Supreme Court. The details of the procedure to obtain the consent of the local authorities and of the property owners, or, in lieu of the latter, the consent of the Appellate Division, were carefully set out in section 5 of the Act.† It required

*Sect. 4 of chapter 4 of the laws of 1891 as amended by chapter 616 of the laws of 1896 (that amendment including all other amendments under this section).

†Sect. 5 of chapter 4 of the laws of 1891 as amended by sect. 2 of chapter 519 of the laws of 189 .

the Board to send to the Common Council of the City "a copy of said plans and conclusions as adopted." It required the consent of the common council of the City "to the construction of a "railway or railways" in accordance with "such "plans and conclusions," and also the approval of the Mayor of the city or, if he should veto an approval by the common council, then the approval "by a two-thirds vote of all the mem- "bers of the Common Council." The same section further provided that "upon obtaining "the approval and consent of the local au- "thorities as above provided," the Rapid Transit Board should "take the necessary steps to ob- "tain if possible the said consents of the prop- "erty owners along the line of the said route "or routes," (that is to say "the consent of the "owners of one-half in value of the property bounded on" the streets as provided in section 4* of the act). If such consents could not be obtained, section 5 required the Board to make application to the Appellate Division of the Supreme Court of the State "for the appointment of three com- "missioners to determine and report after due "hearing whether such railway ought to be con- "structed operated." The same section further provided that, if such commissioners should determine "after public hearing of all par- "ties interested" that the road ought to be constructed and operated, then such report, when confirmed by such Appellate Division, should be taken

*Sect. 4 of chap. 4 of the laws of 1891 as amended by sect. 1 of chap. 519 of the laws of 1895 and chap. 616 of the laws of 1900.

in lieu of the consent of the majority of the property owners.

Section 6* of the act provided that

> "when the consent of the local authorities "and the property owners, or in lieu thereof, "the authorization of the said General Term "(Appellate Division) of the Supreme Court "upon the report of commissioners, shall have "been obtained, the board of rapid transit "railroad commissioners shall at once proceed "to prepare detailed plans and specifications "for the construction of such rapid transit "railway or railways in accordance with the "general plan of construction."

Section 6 further provided that

> "the board may from time to time alter such "detailed plans and specifications *but always* "*so that the same shall accord with the gen-* "*eral plan of construction.*"

And the requirement of the consent of local authorities and of the majority of abutting property owners was made mandatory by sec. 18 of art. 3 of the Constitution of the State of New York adopted in 1894 (this provision having been originally adopted by the People of the State in 1874) as follows:

> "No law shall authorize the construction "or operation of a street railroad except upon "the condition that the consent of the owners

*Sect. 6 of chap. 4 of the laws of 1891 as amended by sect. 1 of chap. 729 of the laws of 1896. There was a later amendment made by chap. 542 of the laws of 1902; but that dos not affect the present controversy.

"of one-half in value of the property bounded "on and the consent also of the local authori- "ties having the control, of that portion of "a street or highway upon which it is pro- "posed to construct or operate such railroad "be first obtained, or in case the consent of "such property owners cannot be obtained, "the General Term" (changed in 1894 to Appellate Division) "of the Supreme Court in "the department in which it is proposed to be "constructed, may, upon application, appoint "three commissioners who shall determine, "after a hearing of all parties interested, "whether such railroad ought to be con- "structed or operated, and their determina- "tion, confirmed by the court, may be taken "in lieu of the consent of the property "owners."

The present counsel has already argued in *Underground Railroad* v. *City of New York* (No. 150 of October Term, 1903) that this provision is strictly applicable to a railroad under streets and cited the decision to that effect of the Court of Appeals of the State in *Matter of New York District Railway Company, 107 N. Y., 42.* Nor do the present Appellant's counsel dissent from this statement.

The Appellant's bill alleged (*p.* 4) that

"on or about the 6th day of November, 1894, "it was determined by vote of the people of "the City of New York as provided in sections "12 and 13 of chap. 752 of the laws of 1894, "that a rapid transit railway or railways "should be constructed for and at the expense "of said city, and thereupon various proceed- "ings were had by the said Board assuming

"to act under the statutory provisions herein-
"before referred to for the purpose of deter-
"mining a route or plan of construction for
"such rapid transit railway."

Section 34* of the Rapid Transit act, referring to such a determination, provided that

"In case the people shall determine by vote
"* * * that any such railway or railways
"shall be constructed for and at the expense
"of such city, then and in that event it shall
"be the duty of said board to consider the
"routes, plans and specifications, if any, pre-
"viously laid out and adopted by them or
"their predecessors and for which *the con-*
"*sents have been obtained referred to in sec-*
"*tion five of this act;* and either to proceed
"with the construction of such railway or rail-
"ways * * * or to change and modify the
"said routes, plans or specifications in such
"particulars as to said board may seem to be
"desirable; or from time to time and with or
"without reference to former routes or plans
"to adopt other or additional routes, plans
"and specifications for such railway or rail-
"ways, provided always that, in all cases in
"which any such change or modification shall
"be of such character as to require the con-
"sents thereto referred to in section five of
"this act, and *in all cases* where other or dif-
"ferent routes or general plans may have
"been so adapted, *the said board shall pro-*
"*ceed to secure the consents required to be*

*This was a new section originally added to chap. 4 of the laws of 1891 by sect. 9 of chap. 752 of the laws of 1894. It was amended by sect. 3 of chap. 729 of the laws of 1896 and by chap. 616 of the laws of 1900. There was a further amendment by chap. 544 of the laws of 1902; but that amendment is immaterial to the present controversy.

"*obtained by section five of this act as therein*
"*set forth.* * * * As soon as such con-
"sents where necessary shall have been ob-
"tained for any rapid transit railroad or rail-
"roads and the detailed plans and specifica-
"tions have been prepared, as provided in sec-
"tion six of this act, the said board for and in
"behalf of said City shall enter into a con-
"tract * * * for the construction of such
"road or roads *upon the routes and in accord-*
"*ance with the plans and specifications so*
"*adopted* * * *."

Section 38* of the Rapid Transit act provided that the Rapid Transit Board might, with the concurrence of six of its members and the consent in writing of the sureties of the contractor, agree with the latter upon changes

"of the plans and specifications upon which
"said road or roads is or are to be con-
"structed; *but* NO CHANGE OR MODIFICATIONS
"IN THE PLANS AND SPECIFICATIONS CONSENTED
"TO AND AUTHORIZED PURSUANT TO SECTION FIVE
"OF THIS ACT SHALL BE MADE WITHOUT THE
"FURTHER CONSENT AND AUTHORIZATION PRO-
"VIDED FOR IN SAID SECTION."

It is thus plain that the State of New York by its constitution and by the act which created the Rapid Transit Board strictly limited the power of the Board in the laying out of routes or the adoption of a plan for a Rapid Transit railroad by the requirement that the route and "the "extent to which any street, avenue or public place "is to be encroached upon" should be approved not

*This was a new section added to chap. 4 of the laws of 1891 by sect. 9 of chap. 752 of the laws of 1894 and was amended by sect. 13 of chap. 519 of the laws of 1895.

only by the Board, but by the local authorities (the Common Council and the Mayor) and by the majority in vaue of the abutting owners or in their place by the Appellate Division of the Supreme Court. It is likewise clear that the Board had no power to make,—but on the contrary, were prohibited to make,—any change in the routes or general plan after the same were adopted except with the like consent to any additional or different use of the streets for the purposes of the railroad.

If the construction of the easterly tunnel section under Park Avenue to which the complainant-appellant objects, had been consented to by the local authorities and by the abutting property owners or the Supreme Court, then according to the bill of complaint, there would be no objection to the construction. Indeed, as has been pointed out (*supra, p.* 2), the Appellant himself consented to this railroad upon the Routes and General Plan which were adopted. The objection, and the only objection,—lies in the supposed fact, asserted by the complainant, that the easterly tunnel section, as actually constructed, is not within the Routes and General Plan consented to by the local authorities and the Supreme Court.

Therefore it was that the complainant brought this suit. Its gravamen is the assertion that what the Rapid Transit Board did or what was done by the contractor (for the allegation of the bill, at page 10, is that the Board did not know the deviation or formally or specifically approve it) was without the authority and in defiance of the prohibition, of the legislature of the State of New York. So at page 11 the allegation of the bill was

"that at none of the times herein mentioned
"did the said Board of Rapid Transit Railroad
"Commissioners have authority (if at all) to
"enter into any contract for the construction
"of any rapid transit railroad under or upon
"the said Park Avenue, except in accordance
"with the said 'routes and general plan' con-
"tained in the said resolutions of January 14
"and February 4, 1897, and * * * that
"the act of the said Board in permitting the
"defendants McDonald and the said Shaler to
"enter upon that part of Park Avenue between
"Thirty-third and Forty-first streets, where
"the tunnel is now in process of construction,
"as aforesaid, was illegal and unauthorized,"

—obviously meaning unauthorized by the laws under which the Rapid Transit Board assumed to act.

I.

Upon the allegations of the bill of complaint which are here controlling the court below was without jurisdiction.

FIRST.

The defendants (the Appellees here) have strenuously insisted and, wherever the question is properly before a court, will continue to insist, that the easterly tunnel section under Park Avenue was within the Routes and General Plan. But the bill of complaint clearly affirms the contrary. And it is upon the basis of that affirmation that we are before this court. The complainant's affirmation has the support of three rulings of the Supreme Court of the State of New York which

are cited here,—not of course as facts,—but as authorities to what has thus far been held to be the law of New York in a case like this.

Barney v. *Rapid Transit Board*, 38 Misc. Rep. (N. Y.) 549: That suit was brought by the present complainant-appellant in the State court. There is as yet no final decree in the cause; but it was heard upon a motion for an injunction *pendente lite;* and upon that motion the State Court said by GIEGERICH, *J.*, at *p.* 549:

> "The gravamen of the action is the alleged "unlawful act of the defendants in so direct- "ing the construction of the rapid transit "tunnel under Park Avenue between 34th and "42nd Streets that the easterly wall of the "tunnel is made to follow a line distant only "seven feet from the building or house line "of the street, it being claimed that in the plan "of construction adopted there is a substan- "tial departure from the maps and descrip- "tions prepared by the board of rapid transit "commissioners in accordance with the "statute which created their powers, the "legality of their acts in causing the build- "ing of a tunnel being dependent upon their "following the scheme of construction outlined "or described in these maps and descriptions "styled for the purposes of the case 'routes "'and general plan.' * * * I think, there- "fore, that no reasonable interpretation of the "'routes and general plan' could afford room "for justifying the extraordinary change in "the position of the tunnel as constructed "from the line described in the lawfully ap- "proved plan of construction as to this par- "ticular locality. The fact being found that

> "the work of building the tunnel at the point "in question is prosecuted without legal "authority, there is technical support for the "plaintiff's action."

The injunction *pendente lite* was refused partly because the action was brought by the plaintiff as a taxpayer, and the court would not sustain it in view of the enormous loss to the City if the action were sustained, and also because, as was said by GIEGERICH, *J.*, at *p.* 550,

> "It may be that before this action is "brought to trial, any illegality which exists "will be removed."

The reference was here to a modification of the Routes and General Plan by the consents of local authorities and the Appellate Division so as to validate the easterly tunnel section. We conceive it to be proper to suggest to this Court, merely as illustration of the sufficiency of State authority,—even from the Appellant's standpoint,—that such proceeding has been taken, that the consent of the local authorities has been obtained and that upon the refusal of the abutting property owners to consent, the necessary application has been made to the Appellate Division of the Supreme Court which has appointed commissioners before whom the hearing is now pending.

Barney v. *City of New York*, 39 Misc. Rep. (N. Y.), 719: This was a second suit brought in the State Court by the present complainant-appellant, now dropping the character of an aggrieved taxpayer. Again no final decree has been entered. But

it was held by the Supreme Court of the State upon an application for an injunction *pendente lite*, that the construction was unlawful, the Court saying by LEVENTRITT, *J.*, at *p.* 721:

> "That the present construction is unauthor-
> "ized must be conceded."

Here again the preliminary injunction was refused, on the ground that the Court preferred to wait for final hearing, and also in view of the prospective validation of the position of the easterly tunnel section.

A still more important authority to the absence of State warrant for the easterly tunnel section is the decision of the APPELLATE DIVISION of the State Supreme Court upon appeal affirming Judge LEVENTRITT's decision in the last cited case. A copy is printed as an APPENDIX to this brief.

For the purposes of this case, therefore, it must be assumed that the construction complained of by the Appellant is in violation of the laws of New York and without any authority from the State of New York. So that the controversy is one between parties all of whom are citizens of the State of New York in the course of which the sole question is whether the laws of that State have or have not been violated by the acts of the defendants. Such a controversy, as we submit, belongs to the courts of the State itself.

Arrowsmith v. *Harmoning, infra.*
Virginia v. *Rives, infra.*
St. Joseph & Grand Island Co. v. *Steele*, 167 U. S., 659.
Hartell v. *Tilghman*, 99 U. S., 547.

SECOND.

Nevertheless the Appellant sees fit in his argument to impute to the State of New York the acts of Rapid Transit Commissioners which the Appellant affirms, and with authority, are in defiance of the laws of New York. For Appellant's bill alleges, as we have shown, facts which are tantamount to an affirmation that the acts of the Appellees are without any authority of the State; and against those acts its courts have thus pronounced.

The fact that the Rapid Transit Commissioners have some duties and powers in the construction of a rapid transit railroad does not commit the State, or begin to commit the State, to any acts of theirs in plain excess of their authority. It will hardly be disputed that, if the Rapid Transit Board, proceeding under these Routes and General Plan, had sought to construct a rapid transit railroad under Broadway instead of Park Avenue or to construct a rapid transit railway under a street of Buffalo, their act would be absolutely without authority, in defiance of the law, and in no way the act, of the State. But the rigorous provisions of law already quoted make it clear that the placing of the tunnel of a rapid transit railroad under a part of the street not within the Routes and General Plan is as clear a violation of law as to place a railroad in an entirely different street or in a different city.

THIRD.

Although the prohibition of the Fourteenth Amendment runs against the State and the State

alone, we do not dispute that the State may act by executive officers as well as by its courts or its legislature or the force of the principle originally stated for this Court by Mr. Justice STRONG in *Ex parte Virginia*, and repeated by this Court in *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S., 226, at *p.* 223, that

> "the prohibitions of the amendment refer to "all the instrumentalities of the State, to its "legislative, executive and judicial author- "ities. And therefore whoever by virtue of "public position under a State government "deprives another of any right, protected by "that amendment against deprivation by the "State, violates the constitutional inhibition; "and *as he acts* in the name and *for the State* "*and is clothed with the State's power*, his act "is that of the State."

The Court was there dealing with a final judgment of a State court which it held must be deemed "the act of the State" within the meaning of the amendment. The rule clearly implies that the act of the officer becomes the act of his State, only if he is "clothed with the State's power" to do the act, that is to say, if what he does is done "by virtue of public authority" of the State. The Amendment undertakes to curb the State, through whomsoever or however it may act; but it does not run against subordinate agents of the State to prevent them from flagrantly defying State authority. So it is that, where a person being a public officer seizes property,—acting not *virtuti officii* but *colore officii* and without lawful right, the claim lies against him individually and not

against the State or other government of which he was a public officer.

Tindal v. *Wesley*, 167 U. S., 204.
U. S. v. *Lee*, 106 U. S., 196.
Cunningham v. *Macon & Brunswick R. R.*, 109 U. S., 446, 452.
Stanley v. *Schwalby*, 147 U. S., 508, 518.
Stanley v. *Schwalby*, 162 U. S., 255, 271.
Belknap v. *Schild*, 161 U. S., 10.

The grievance complained of, as Mr. Guthrie very well puts it in his "Lectures on the Four-"teenth Amendment" (*p.* 72), "must be sanc-"tioned by a State statute or some other form of "State authority," and the Amendment "does not "confer jurisdiction to correct the erroneous or "wilfully improper acts of State officers or courts "in violation or disregard of law."

Virginia v. *Rives*, 100 U. S., 313: This authority is cited by our adversaries, but we submit that its doctrine is fatal to their contention. For the Court said by Mr. Justice STRONG, at *pp.* 319, 321, 322.

> "It is evident, therefore, that the denial or "inability to enforce in the judicial tribunals "of a State, rights secured to a defendant by "any law providing for the equal civil rights "of all persons citizens of the United States, "of which sect. 641 speaks, is primarily, if "not exclusively, a denial of such rights, or an "inability to enforce them, resulting from the "constitution or laws of the State, rather "than a denial first made manifest at the trial "of the case. In other words, the statute has

"reference to a legislative denial or an in-
"ability resulting from it. * * *

"When a statute of the state denies his
"right, or interposes a bar to his enforcing it,
"in the judicial tribunals, the presumption is
"*fair that they will be controlled by it* in their
"decisions; and in such a case a defendant
"may affirm on oath what is necessary for a
"removal. Such a case is clearly within the
"provisions of sect. 641. *But when a subor-*
"*dinate officer of the State, in violation of*
"*State law, undertakes to deprive an accused*
"*party of a right which the statute law ac-*
"*cords to him, as in the case at bar, it can*
"*hardly be said that he is denied, or cannot*
"*enforce, 'in the judicial tribunals of the*
"*'State' the rights which belong to him. In*
"*such a case it ought to be presumed the court*
"*will redress the wrong.* If the accused is
"deprived of the right, the final and practical
"denial will be in the judicial tribunal which
"tries the case, after the trial has commenced.
"If, as in this case, the subordinate officer
"whose duty it is to select jurors fails to dis-
"charge that duty in the true spirit of the
"law; if he excludes all colored men solely be-
"cause they are colored; or if the sheriff to
"whom a *venire* is given, composed of both
"white and colored citizens, neglects to sum-
"mon the colored jurors only because they are
"colored; or if a clerk whose duty it is to take
"the twelve names from the box rejects all the
"colored jurors for the same reason,—it can
"with no propriety be said the defendant's
"right is denied by the State and cannot be
"enforced in the judicial tribunals. The
"court will correct the wrong, will quash the
"indictment or the panel, or, if not, the error
"will be corrected in a superior court. We

> "cannot think such cases are within the pro-
> "visions of sect. 641. Denials of equal rights
> "in the action of the judicial tribunals of the
> "State are left to the revisory powers of this
> "Court."

Arrowsmith v. *Harmoning*, 118 U. S., 194: There the plaintiff alleged that he had been deprived of his property without due process of law and therefore invoked the federal jurisdiction. The property which he said was wrongfully taken from him had been sold in a proceeding in a probate court of Ohio by a special guardian who had not given a bond such as was required by the law of Ohio. The plaintiff having been defeated in the Supreme Court of Ohio to which he carried his case, brought it here by writ of error; and the judgment was affirmed, this Court saying by Chief Justice WAITE (*p.* 196):

> "Certainly a state cannot be deemed guilty
> "of a violation of its constitutional obliga-
> "tion simply because one of its courts while
> "acting within its jurisdiction has made an
> "erroneous decision. The legislature of a
> "state performs its whole duty under the con-
> "stitution in this particular when it provides
> "a law for the government of its courts while
> "exercising their respective jurisdictions
> "which, if followed, will furnish the parties
> "the necessary constitutional protection."

Kiernan v. *Multnomah Co.*, 95 Fed. Rep., 849: The complainant in this case, being a citizen of Oregon, sued the sheriff of one of the counties of that state to restrain the collection of certain taxes for which the sheriff had a warrant under which

he threatened to sell the complainant's property. His bill showed that the tax and the proceedings under which the sheriff threatened to act, were not authorized by state law, and alleged that a sale by the sheriff would be a taking of property without due process of law and, therefore, in violation of the Fourteenth Amendment. The court dismissed the bill for want of jurisdiction, saying at page 849:

> "The Fourteenth Amendment has reference "exclusively to state action and not to any ac- "tion by individuals. It is a prohibition "upon the state 'to make or enforce any law " 'which shall abridge the privileges or im- " 'munities of citizens of the United States' or "which shall 'deprive any person of life, lib- " 'erty or property without due process of " 'law.' It prohibits state legislation in vio- "lation of these rights. It does not refer to "any action by private individuals (*Virginia* "v. *Rives*, 100 U. S., 318; *U. S.* v. *Cruikshank*, "92 U. S., 542; *Civil Rights Cases*, 109 U. S., "11, 3 Sup. Ct., 18); otherwise every invasion "of the rights of one person by another would "be cognizable in the federal courts under this "amendment. The questions sought to be "presented in this case relate to the interpre- "tation to be given a law of the state, and the "complaint is that this law is being misin- "terpreted and misapplied to the injury of the "plaintiff in his rights of property. In all "such cases, where there is not the requisite "diverse citizenship and amount in contro- "versy to give the court jurisdiction, the "remedy for the injuries complained of is in "the state courts."

Re Storti, 109 Fed. Rep., 807: The ruling here was made by Judge PUTNAM of the First Circuit who dismissed a petition of a subject of the King of Italy under sentence of death imposed by a Massachusetts court, saying (*p.* 809):

> "But the case shows beyond all question "that the legislature of Massachusetts has "done its duty and the only claim brought to "our attention by the petition is that some "one, the attorney-general, the warden of the "state prison, or somebody else, is not going "to do his duty. Now beginning with the "case of *Arrowsmith* v. *Harmoning* (118 U. "S., 194) and following down through a long "line of cases, and also through a line of "parallel cases raising the same question, but "in different forms, it is held that the four- "teenth amendment does not apply where the "legislature has done its duty, and where the "fault is incidental either with the courts or "with officials; therefore so far as the four- "teenth amendment is concerned, it is clear "that we have no jurisdiction."

Manhattan Ry. Co. v. *City of New York*, 18 Fed. Rep., 195: The complainant here sought to enjoin the collection of taxes assessed by commissioners appointed pursuant to law. The Court denied the complainant's motion for an injunction, saying by WALLACE, *C. J.*, at *p.* 196:

> "The averments of the bill are intended to "make a case arising under the Fourteenth "Amendment of the Constitution, and if any "federal question is presented it arises under "that amendment. There are general aver-

"ments in substance that the state by the laws "under which the assessing officers have acted "unlawfully discriminates between the com- "plainants and individuals and subjects the "property of the complainants for the pur- "poses of taxation to an unequal share of the "public burdens."

Then, after pointing out what were the "specific "averments" of the bill, the court said (*p.* 197):

"The question is whether, the state has "made or is enforcing by its laws a system "of taxation which abridges the privileges or "immunities of the complainants or denies to "them the equal protection of the laws. If "the authorities of the City of New York are "endeavoring to enforce the collection of "taxes against the complainants which have "not been assessed in conformity with the "statutes of the state, if *the taxing authorities "under color of law are proceeding illegally,* "their action cannot be imputed to the state, "and the constitutional provision need not be "invoked and does not operate, and the com- "plainants can obtain ample redress under "the laws of the state * * * (*p.* 198). "If the complainants are entitled to any relief "against the proceedings of the defendants, "it is not through any right which springs "from the Fourteenth Amendment, but their "right is founded on the laws of the state "* * * (*p.* 199). The suit, therefore, is "not one arising under the constitution or "laws of the United States and, as no diver- "sity of citizenship exists between the parties, "this court cannot decide it. A case does not "arise under the constitution or laws of the

"United States unless it cannot be decided "without deciding a federal question (*Har-* "*tell* v. *Tilghman*, 99 U. S., 547), or, in other "words, unless a federal law is a necessary "ingredient in the case (*Osborne* v. *Bank of* "*U. S.*, 9 Wheat., 738)."

FOURTH.

The authorities cited for the Appellant do not, we submit, weaken the authorities we have cited or the inferences we have drawn from them.

Ex parte Virginia, 100 U. S., 339: It is upon this case that the Appellant seems to rest his appeal. A county judge of Virginia was indicted for his exclusion of black citizens from grand and petit juries,—the indictment being found under the federal act of March 1, 1875, entitled "An Act "to protect all citizens in their civil and legal "rights" (18 Stats., Part 3, 336). The state of Virginia supported him and itself was the petitioner in this Court for his discharge on habeas corpus.

The question whether Congress had power under the Fourteenth Amendment to assume the responsibility of a state for an act committed by one of its subordinate officers beyond the authority, and even in defiance of the authority, which the State had given him, we do not need to consider here. For there is no act of Congress analogous to the act of March 1, 1875, which applies to proceedings of the Rapid Transit Board of New York.

The passage from the opinion of Mr. Justice STRONG (*100 U. S., p.* 348) which is cited by the

Appellant at *p.* 18 of his brief, was not, as the Court will perceive, an essential part of the opinion but was to some extent *obiter dictum.* The Court had already held that the action of the county judge was not judicial but "merely a "ministerial act, as much so as the act of a sheriff "holding an execution in determining upon what "piece of property he will make a levy * * * "that the jurors are selected for a court makes no "difference." It was after stating that conclusion that Mr. Justice STRONG added the words quoted by the Appellant as follows:

> "But if the selection of jurors could be con-
> "sidered in any case a judicial act, can the
> "act charged against the petitioner be con-
> "sidered such when he acted outside of his
> "authority and in direct violation of the
> "spirit of the State statute? That statute
> "gave him no authority when selecting jurors
> "from whom a panel might be drawn for a
> "circuit court, to exclude all colored men
> "merely because they were colored. Such an
> "exclusion was not left within the limits of
> "his discretion. It is idle, therefore, to say
> "that the act of Congress is unconstitutional
> "because it inflicts penalties upon State
> "judges for their judicial action. It does no
> "such thing."

Now these words, whether *obiter* or not, must be construed with the whole body of the opinion. The State of Virginia, it is to be remembered, was before this Court itself assuming and standing for the cause of the petitioner. The petitioner acted under a general grant from the State of power to

draw jurors. He had from the State the *power* to do what he did, even if it did not authorize him to make the discrimination from a motive of bias against colored citizens. So that the all controlling proposition of the Court was that stated by Mr. Justice STRONG as follows (*p.* 347):

> "Whoever *by virtue of* public position "under a State government deprives another "of property, life or liberty without due pro- "cess of law or denies or takes away the equal "protection of the laws, violates the constitu- "tional inhibition; and as he acts in the name "and *for the State* and *is clothed with the* "*State's power,* his act is that of the State."

But in the case now at bar the authority from the State was strictly limited and included a plain prohibition upon the Rapid Transit Board to construct any rapid transit railroad otherwise than in conformity with Routes and a General Plan duly prescribed and duly approved by the necessary authorities, local and judicial.

That we apprehend the true force of the ruling of this Court in *Ex parte Virginia* is further obvious from this, that the decision was rendered at the very same time with that in *Virginia* v. *Rives*, and was pronounced by the same Justice. And we venture again to quote from the opinion in *Virginia* v. *Rives* the following words which were neither *obiter* nor unnecessary, but strictly and necessarily decisive (*100 U. S., 321*):

> "But when a subordinate officer of the "State in violation of State law undertakes

> "to deprive an accused party of a right which "the statute law accords to him as in the case "at bar, it can hardly be said that he is denied "or cannot enforce 'in the judicial tribunals "'of the State' the rights which belong to "him."

Neal v. *Delaware,* 103 U. S., 370: This was a writ of error to the Supreme Court of Delaware. And we concede at once that a judgment of the Supreme Court of any State, authorized by its organic law to conclusively interpret its laws, must be deemed to be the act of the State itself. So the act of the officers of Delaware, who, as it appeared, had been charged by the State with the general duty of selecting jurors and who had discriminated against black jurors, became the act of the State when it was supported by the highest judicial authority of the State. As as said by this Court in deciding the case, at *p.* 397:

> "The refusal of the state court to redress "the wrong by them (the officers who selected "the jurors) committed was a denial of a right "secured to the prisoner by the Constitution "and laws of the United States."

Civil Rights Cases, 109 U. S., 3: When the Court here said, by MR. JUSTICE BRADLEY, at *p.* 15, that

> "whether the statute book of the State actu- "ally laid down any such rule of disqualifica- "tion or not, the State, through its officers, en- "forced such a rule; and it is against such "State action, through its officers and agents "that the last clause of the section is di- "rected,"

the Court was again dealing with the act of 1st March, 1875; and also at *p.* 17:

> "In this connection it is proper to state that "civil rights, such as are guaranteed by the "Constitution against State aggression cannot "be impaired by the wrongful acts of individ- "uals unsupported by State authority in the "shape of laws, customs, or judicial or execu- "tive proceedings. The wrongful act of an in- "dividual, unsupported by any such authority, "is simply a private wrong, or a crime of that "individual; an invasion of the rights of the "injured party, it is true, whether they affect "his person, his property, or his reputation; "but if not sanctioned in some way by the "State, or not done under State authority, his "rights remain in full force and may presuma- "bly be vindicated by resort to the laws of the "State for redress."

Yick Wo v. *Hopkins*, 118 U. S., 356: Here an ordinance was complained of which had been adopted by a city and which denied the equal protection of the laws to Chinese. The Supreme Court of the State held that the ordinance was within the power of the city under the constitution and authorities of the State. Obviously, therefore, the ordinance was an act of the State and as such subject to review in this Court upon writ of error to the Supreme Court of the State.

The Appellants cite *Scott* v. *McNeal*, 154 U. S., 34, and *Chicago B. & Q. R. Co.* v. *Chicago*, 166 U. S., 226; but they seem to us unavailing for his purpose; for there the acts complained of were made acts of the State by the approval of their highest judicial authorities.

Reagan v. *Farmers' Loan & Trust Co.*, 154 U. S., 362: Here the State by an act of its legislature had established a railroad commission giving it power to establish reasonable rates and leaving the determination of what was reasonable to the discretion of the commission. Obviously, therefore, the establishment of rates by the commission was the establishment of rates by the State itself. For, although the commissioners may not have exercised their *discretion* fairly, nevertheless the State permitted to them the discretion with the power to abuse it.

Iron Mountain Co. v. *Memphis*, 96 Fed. Rep., 113: In citing this case the Appellant quotes language by TAFT, *Circ. J.*, in which he pointed out that the thing objected to was done by the legislative council of the City of Memphis "*under its "general power of controlling the streets.*". But in the present case the Rapid Transit Board has no such general power.

Pacific Gas Co. v. *Ellert*, 64 Fed. Rep., 421: This is more nearly an authority in the Appellant's favor than any other case which he has cited. There the Circuit Judge (now Mr. Justice MCKENNA) dealt with the claim that the objectionable act of a board of supervisors was "without authority" from the State. But the act was not, as here, in express defiance of the mandate of the State. It was there said that the contention that, as the board of supervisors was proceeding without State authority, it did not represent the

State, "*appeared* to be opposed to *Ex parte Vir-*
"*ginia,* 100 U. S., 346." The learned Circuit Judge, at page 431, referred to the language of the dissenting Justices, FIELD and CLIFFORD, in *Ex parte Virginia,* who said:

> "Nor can the unauthorized action of an
> "executive officer (of a State) imposing upon
> "the rights of the citizen be taken as evidence
> "of her intention or policy so as to charge
> "upon her a denial of such rights."

This expression seemed to be taken as proof that the majority of the Court in *Ex parte Virginia* held a doctrine the reverse of that expressed by the minority. But a statement of law in a dissenting opinion is erroneous only if the majority of the court rule otherwise. We submit that there is nothing in the opinion of the Court in *Ex parte Virginia* to justify the assumption that this particular statement of the dissenting judges was overruled or that the Court intended to hold that a sheerly unauthorized act of a subordinate officer of a state is the act of the state.

II.

The court below was without jurisdiction for the reason that the bill of complaint did not show that the appellant was threatened with the deprivation of any property.

The Appellant is a mere abutter. He does not own the fee of the street in which the alleged unlawful construction is taking place. He does not dispute the general right of the State of New York by its Rapid Transit Board and under the rapid transit legislation to build a rapid transit railroad under Park Avenue. On the contrary he has, by formal consent, conceded the right. His only claim is that the railroad is unlawfully near to his property and that (Bill, *p.* 11) the risk of injury to his said residence owing to the work of construction—

> "has become much greater than it would "have been had the work been done according "to the 'routes and general plan' adopted by "the board as aforesaid and the risk of dam- "age after the railroad shall have been put "in operation by reason of the vibration "caused by trains or by other objectionable "results is in like manner greatly increased."

So his prayer for relief is (Bill, *p.* 12) for an injunction against the defendant's construction—

"under Park Avenue adjacent to complain-
"ant's said premises until the easements ap-
"purtenant thereto shall have been duly ac-
"quired according to law and due compensa-
"sation therefore made to complainant."

The fee of the streets of New York belongs to the City itself.

Hoffman, Estate and Rights of the Corporation of New York, p. 368.
People v. *Kerr,* 27 N. Y., 188.
Kellinger v. *Forty-second Street Railway Co.,* 50 N. Y., 206-211.
Matter of New York C. & H. R. R. R. Co., 77 N. Y., 248.
Drake v. *Hudson River R. R. Co.,* 7 Barbour, 508.

The only easements which the Appellant has in the street are easements of light, air and access.

Bischoff v. *N. Y. El. R. R.,* 138 N. Y., 257: The Court of Appeals of the State here said by ANDREWS, *C. J.* (*p.* 262):

"The property rights of an abutting owner
"consist of easements of light, air and access.
"There are no easements of privacy or quiet
"or other easements than those mentioned for
"which compensation can be claimed."

American Bank Note Co. v. *New York El. R. R. Co.,* 129 N. Y., 252: The same court here said by FINCH, *J.,* (*p.* 271):

"What the elevated roads take from the "abutter are his easements of *light, air and* "*access.* * * * Now, the elevated roads "take no land from the abutter. They stand "wholly upon the land owned by the munici- "pality, and no consequential damages flow- "ing from the lawful corporate user could be "recovered but from the fact that some of "them, though not all of them, have been by "the Story case transformed from conse- "quential injuries into invasions of property "rights. To the extent of that transforma- "tion the rule of damages must feel the effects "of the change, but beyond that the further "consequential injuries have not lost or "changed their character, and to allow them "as elements of compensation is to transform "them also into invasions of property, and "add a new brood of easements to those al- "ready awarded to the abutter, instead of "leaving them, where the Story case left them, "the mere incidents of a lawful use. In the "Drucker case the full extent of the transfor- "mation bringing with it the liability for dam- "ages was sketched in these words: 'Smoke " 'and gases, ashes and cinders affect and im- " 'pair the easement of air; the structure it- " 'self and the passage of cars lessen the ease- " 'ment of light; the drippings of oil and " 'water, and possibly, the frequent columns " 'interfere with the convenience of access;' "but there is no hint of any allowable recov- "ery beyond what *pro tanto* constituted some "elements of the taking. In the Lahr case, "RUGER, *Ch. J.*, was equally guarded, saying "that the incidental injuries could be recov- "ered 'provided the evidence established the " 'fact that they were destructive of the ease- " 'ments of light, air and access,' and these

"careful expressions were used although "neither case involved a question of fee dam- "age. I am adverse to adding to the abutter's "easements by changing their names and do- "ing indirectly what I am sure none of us "would do directly."

As is well stated in the brief of Messrs. Nicoll and Brown, of counsel for the Appellee, McDonald, referring to the fact that the rapid transit railroad in Park Avenue is entirely under ground, and affects neither light nor air nor access of abutters,—

"The complainant has been deprived of no "easement; and since he does not own the fee "of any part of the street, there has been no "taking of property from him through the "mere addition of another burden to the uses "to which the street has formerly been put."

We ask leave to adopt as our own the discussion of Messrs. Nicoll and Brown under this head, and especially their citations of the decisions of this Court to the effect that the alleged impairment of the comfort to be enjoyed in the plaintiff's premises through the acts of the City and its Rapid Transit Board underneath the surface of its own streets is not a taking of property within the meaning of the Fourteenth Amendment.

Marchant v. *Pa. R. R. Co.*, 153 U. S., 380.
Meyer v. *City of Richmond*, 172 U. S., 82.
Gibson v. *U. S.*, 166 U. S., 269.
Eldridge v. *Trezevant*, 160 U. S., 452.

III.

The decree should be affirmed.

EDWARD M. SHEPARD,
of counsel for the Appellee,
the Board of Rapid Transit Railroad Commissioners.

APPENDIX.

BARNEY v. *THE CITY OF NEW YORK*, *83 Appellate Division Reports* (*N. Y.*), *237*.

OPINION OF THE COURT.

INGRAHAM, *J.*: This appeal is from an order of the Special Term denying a motion for an injunction restraining the defendants from further excavating, blasting or constructing the rapid transit tunnel for the underground railroad under Park avenue adjacent to the plaintiff's premises, or from continuing the work of tunnel construction in such a manner that the easterly side of the tunnel or of the excavation therefor, shall be nearer to the building or house line than the tunnel described and shown in the routes and general plan adopted and approved by the defendants, the Rapid Transit Railroad Commissioners. The plaintiff is the owner of a dwelling house on the east side of Park avenue, at the corner of Thirty-eighth street. In pursuance of legislative authority, the Rapid Transit Commissioners prepared a general plan for the construction of an underground railroad in The City of New York. That general plan was approved by the municipal authorities, but the property owners having refused to consent to the construction of the road, application was made to this court for authority to construct and operate the said road, notwithstanding such refusal. The plans as prepared by the Rapid Transit Commissioners, and which were submitted to this Court for approval, contemplated three separate tunnels under Park avenue, in front of the plaintiff's premises, the easterly side of the easterly tunnel being thirty-seven feet and six

inches from the building line of the property on the east side of Park avenue. The centre tunnel was twenty-four feet in width, to be constructed in the middle of the avenue, and was separated from the east tunnel by a masonry wall. The centre tunnel was to contain two tracks, while the easterly tunnel was to contain one track, and it was this method of construction that was approved by this Court. After such approval, the Commissioners of Rapid Transit made the detailed plans necessary for a contract to construct the road. Upon a further consideration, the original plans were modified by substituting for the three tunnels originally proposed, two tunnels, one upon the east and the other upon the west side of Park avenue, the east side tunnel being thirty-five feet from the building line of the abutting property on the easterly side of Park avenue. The contract was made between the Commissioners of Rapid Transit and the defendant McDonald, for the construction of the road according to these modified plans. Subsequent to the execution of this contract, a further modification of these plans was considered necessary by the Chief Engineer in charge of the work, and such modification was directed by him without any formal action of the Rapid Transit Board, and without the consent of either the property owners or of this Court. By this modification, the easterly tunnel was located on the east side of Park avenue, about seven feet from the building line of the property. The construction of this easterly tunnel was prosecuted under the authority of the Chief Engineer of the Board of Rapid Transit Commissioners, with the approval of the engineer of the contractors, but without other authority. After the excavation was substantially completed, at a cost to The City of New York of upwards of $400,000, this action was commenced to enjoin the further construction of this tunnel under Park avenue, and to compel the defendants to fill up the excavation already made and to proceed with the plans as originally proposed.

The evidence is that it would cost The City of New York to comply with this demand in the neighborhood of $500,000, in addition to the money already spent, and would delay the completion of the work for about eighteen months; and the question that was presented to the Court below was, whether in view of these facts, in the exercise of its judicial discretion, this work should now be stopped, entailing upon the public and the City this delay in the prosecution of the work, with the large additional cost indicated. It is undoubtedly true that this modification of the plans, materially changing the relation of the proposed road to the abutting property without the consent of the property owners, or in lieu thereof the approval of this Court, was entirely unauthorized. The constitutional provision (Const., art. 3, §18) recognized and enforced by the statutes under which this road is being constructed (Laws of 1891, Chap. 4 as amd.), by which this railroad could not be built without the consent of the property owners, or in lieu thereof the approval of this Court, provided safeguards for the protection of property abutting upon a street through or under which it was proposed to construct a railroad. Before such a road should be constructed, the abutting owners were to be consulted; but in order to prevent the opposition of the property owners from preventing a necessary public improvement, provision was made by which an approval by this Court for the construction of such a railroad could take the place of the consent of the property owners; but that was only to be done where notice to the property owners was given so that they could be heard in opposition to the construction of the road; and the application to this Court for its approval was necessarily based upon the plans for the construction and location of the proposed road, so that the property owners could have an opportunity of presenting their objections to the road as it was proposed to be constructed and located. Before a tunnel within seven feet of the property was auth-

orized the abutting owners had the right to be heard and present their objection to a tunnel so located.

We will assume, therefore, in the disposition of this application, that the change of location was unauthorized, and if before any work had been done or substantial progress had been made in the excavation an application had been made for an injunction, that the Court would have been justified in restraining the further prosecution of the work until the necessary consents had been obtained. An entirely different question is presented where the application for an injunction is made after the excavation of the tunnel has been substantially completed and where all that remains is to construct the necessary masonry walls and supports. That it would be a much more serious injury to the plaintiff's property to leave the excavation in the condition in which it was when this action was commenced than to allow it to be proceeded with and the necessary walls and supports constructed, is apparent. The only result of now granting a preliminary injunction would be to stop the work, leaving this hole in the ground unsupported; while if the contractors are allowed to proceed with the construction of the tunnel, the adjoining property would be secure against further settling or injury. The injunction asked for, therefore, would seem to be without any advantage to the plaintiff, but would subject him and the other property owners to the danger of having the adjacent rock settle into this excavation and so injure rather than protect his property.

The learned counsel for the plaintiff insists that the operation of the road in this tunnel will be a serious injury to his property, and that for that reason the further construction of the tunnel, as at present located, should be enjoined. But we think the question of the operation of the road should be left until it can be determined, by its actual operation, whether or not such operation will entail upon the adjoining property any injury or disad-

vantage. The importance of this public improvement, the fact that it has involved the expenditure of such a large amount of public money, and the necessity for additional means of transportation of passengers in New York are facts which should be considered in determining whether the Court should interfere by an injunction which would prohibit the completion of the public improvement, or adopt other methods to protect or compensate the abutting property owners. The question is whether there should be a preliminary injunction pending the trial of the action; and we think in view of the situation, the enormous public interests involved, and the fact that such an injunction, while affecting most seriously the defendants, would be of no advantage to the plaintiff or the abutting owners, that the Court, in the exercise of the judicial discretion which it is bound to exercise in considering an application of this kind, was quite justified in refusing to grant the preliminary injunction asked for, leaving the question of the relief to which the plaintiff would be entitled to be determined upon the trial. Without attempting at all to indicate an opinion as to what the Court should do when the question as to the final judgment is presented, we affirm the order appealed from as a proper exercise of discretion in refusing to grant an injunction before judgment.

It follows that the order appealed from should be affirmed, with $10 costs and disbursements.

VAN BRUNT, *P. J.*, MCLAUGHLIN AND LAUGHLIN, *J. J.*, concurred.